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STATE OF WASHINGTON

IN THE SUPREME COURT OF WASHINGTON

No. 83024-0

Court of Appeals No. 60528-3-I

Bellevue School District,

Petitioner

v.

E.S.

Respondent

**Respondent's Supplemental Brief
On State Constitutional Issue**

Robert C. Boruchowitz WSBA 4563
Taki Flevaris, Rule 9

Counsel for Respondent
1112 E. Columbia, Seattle WA 98122
206 398 4151

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
----------------------------------	-----------

ARGUMENT

I. INTRODUCTION	1
II. THE TRUANCY CONTEXT MUST BE EVALUATED SPECIFICALLY AND INDEPENDENTLY TO DETERMINE STATE DUE PROCESS PROTECTIONS	3
III. STATE DUE PROCESS PROTECTION IS BROADER THAN FEDERAL PROTECTION IN THE TRUANCY CONTEXT.....	5
IV. CONCLUSION	10

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<i>Brown v. Board of Ed.</i> , 347 U.S. 483 (1954).....	7
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	3

WASHINGTON CONSTITUTION

Article 9, Section 1	3
----------------------------	---

WASHINGTON CASES

<i>Bellevue School Dist. v. E.S.</i> , 148 Wn. App. 205 (2009)	6, 10
<i>In re Grove</i> , 127 Wn.2d 22 (1995).....	8
<i>In re King</i> , 162 Wn.2d 378 (2007)	5, 6, 8
<i>In re Luscier</i> , 84 Wn.2d 135 (1974).....	8
<i>Madison v. State</i> , 161 Wn.2d 85 (2007)	6
<i>Seattle Sch. Dist. No. 1 v. State</i> , 90 Wn.2d 476 (1978)	7, 9
<i>State ex rel. Gallwey v. Grimm</i> , 146 Wn.2d 445 (2002)	6
<i>State ex rel. Shoreline Sch. Dist. No. 412 v. Sup. Ct.</i> , 55 Wn.2d 177 (1960)	9
<i>State v. Bartholomew</i> , 101 Wn.2d 631 (1984).....	4
<i>State v. Gunwall</i> , 106 Wn.2d 54 (1986)	1, 8, 10
<i>State v. Ortiz</i> , 119 Wn.2d 294 (1992)	4, 5
<i>State v. Patton</i> , 167 Wn.2d 379 (2009).....	1
<i>State v. Seattle Gas & Elec. Co.</i> , 28 Wn. 488 (1902)	7
<i>State v. Spurgeon</i> , 63 Wn. App. 503 (1991).....	7
<i>State v. Valdez</i> , 2009 Wash. LEXIS 1156 (Dec. 24, 2009).....	1, 2
<i>Weiss v. Bruno</i> , 82 Wn.2d 199 (1973)	6

WASHINGTON STATUTES

RCW 28A.225.020(1).....	9
RCW 71.34.720.....	8

OTHER AUTHORITIES

Dillon, Mun. Corp. (4th Ed.) § 9	7
Spitzer, New Life For The "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead--Long Live Gunwall!", 37 RUTGERS L.J. 1169 (2006).....	3

I. INTRODUCTION

The Respondent E.S. has urged this Court to find that both the Washington and United States Constitution due process clauses require that a child in a truancy hearing be provided counsel. Appellant's Opening Brief at 18, Supplemental Respondent's Brief at 21. Under the *Mathews v. Eldridge* Fourteenth Amendment analysis, the Court of Appeals opinion herein should be upheld, and the Court also may rely on Article I, Section 3 of the state Constitution to uphold the Court of Appeals opinion.

There is authority for this Court to consider the state constitution first and to uphold the Court of Appeals on that basis, *State v. Patton*, 167 Wn.2d 379, 385 (2009), to consider the state constitution as providing broader protection if it finds that the federal constitution does not support the decision, *State v. Gunwall*, 106 Wn.2d 54, 68 (1986), and to consider both constitutions simultaneously in upholding the Court of Appeals decision, *State v. Valdez*, 2009 Wash. LEXIS 1156 (Dec. 24, 2009).¹

In *Valdez*, this Court said, "Article I, section 7 is a jealous protector of privacy," and found that the challenged search "violated both

¹ It is worth noting that the US Supreme Court has never squarely addressed the question of whether the federal constitution requires counsel in truancy proceedings. This Court could rule on this issue under the state constitution without necessarily having to make a determination that the Washington constitution provides broader protection than the federal constitution.

the Fourth Amendment and article I, section 7” and upheld the Court of Appeals decision on both grounds. *Id.* E.S. asks this Court to apply the same approach here, that the Court of Appeals opinion should be upheld because both the state and federal constitutions require that counsel should be provided to a child in a truancy hearing.

Should this Court find that the federal constitution does not support the Court of Appeals decision, it should find that the state due process clause, reinforced by the state constitution’s greater privacy protection and its special protection for education, does support it.

Counsel for the School District has argued that the Washington Constitution provides no greater due process right to a child in a truancy proceeding than does the federal constitution. Petitioner’s Supplemental Brief on State Constitutional Claim, (hereafter “Pet. Br.”) at 10. As outlined below, this Court has found greater due process protections under the state constitution and there are sound reasons to do so in this context.

The District fails to focus on the question of whether the Washington Constitution provides broader due process protections *in the particular context* of truancy proceedings, rather than broader due process protections generally. The district minimizes the local aspect of the truancy context (regarding juveniles and education) and the threat of

erroneous interference with a right to education that is specially provided and protected by Article 9, Section 1. Pet. Br. at 5.²

Due process requires a balancing of children's interests in education, privacy, and physical liberty (including the erroneous deprivations that could result without counsel), against costs of providing counsel. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The assessment of Washington's due process clause in this context requires that additional and substantial weight be placed on the educational interests at stake.

II. THE TRUANCY CONTEXT MUST BE EVALUATED SPECIFICALLY AND INDEPENDENTLY TO DETERMINE STATE DUE PROCESS PROTECTIONS

As this Court emphasized in *Gunwall*, "the context presented" is a relevant factor in determining whether state constitutional provisions provide broader protection than the federal counterpart.³ The District minimizes this fact, as when it frames the issue before this court as whether "the state constitutional right to due process differ[s] from the

² Article 9, Section 1 provides: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

³ This Court has shifted "its focus from using the *Gunwall* tests as barriers to be overcome when independently interpreting the state constitution, to using those criteria principally as briefing and interpretive devices,..." Spitzer, *New Life For The "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead-- Long Live Gunwall!"*, 37 RUTGERS L.J. 1169, 1199 (2006).

federal constitutional right[.]” Pet. Br. at 1. That is not exactly the issue before this Court. The issue is whether the federal and state constitutional rights to due process require providing counsel to children *in truancy proceedings* and if the federal one does not, whether the state right does.

The District recognizes that this Court extended state due process protections beyond federal limits in *State v. Bartholomew*, 101 Wn.2d 631, 639 (1984), in which this Court said, “in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause.” The Court focused on fundamental fairness. 101 Wn. 2d at 640.

The District argues that *Bartholomew* is “unique” and that its reach was limited by *State v. Ortiz*, 119 Wn.2d 294 (1992). Pet.Br. at 7-9. The fact that this Court’s holding in *Bartholomew* related to the particular issue in that case (use of evidence of uncharged/unproved crimes in death penalty sentence proceedings), and the Court independently analyzed state due process requirements in *Ortiz* (concerning the State’s failure to preserve potentially exculpatory evidence), *supports* the argument that due process requirements in the truancy context must be evaluated independently. The District quotes relevant language from *Ortiz*, “This case concerns a different application of due process”, but fails to grasp its

relevance: each application of due process merits its own analysis. Pet. Br. at 9 (quoting *Ortiz*, 119 Wn.2d at 304). The District's citation of decisions that have rejected independent state constitutional analysis of the due process clause, Pet.Br. at 2, is not dispositive in the context of truancy.

III. STATE DUE PROCESS PROTECTION IS BROADER THAN FEDERAL PROTECTION IN THE TRUANCY CONTEXT

In addition to the liberty and privacy interests articulated by the Court of Appeals, Washington's due process clause requires provision of counsel in truancy proceedings because (1) fundamental unfairness would otherwise result, (2) such proceedings concern issues that are essentially local in nature, and (3) truancy proceedings threaten erroneous deprivation of the fundamental state constitutional right to education.

The District relies heavily on *In re King*, 162 Wn.2d 378 (2007), in which this Court held that appointed counsel in dissolution proceedings was not required by the due process clause. Pet. Br. at 1-3. This Court held that there was no fundamental liberty interest at stake and pointed out that the state did not have a significant role in a private dissolution proceeding. "These factors distinguish a dissolution proceeding from instances where counsel is constitutionally required." 162 Wn.2d 378, 395. In truancy cases, liberty interests are at stake and the state has a critical role.

In *King*, the Court found that Ms. King did not cite authority for her argument that some other state constitutional provisions were relevant

to the analysis of Article I, Section 3. 162 Wn.2d at 393, n. 14. In contrast, E.S. has provided ample authority to establish the relevance of Article 9, § 1 in truancy proceedings. The mandate of Article 9, § 1 “must be carried out in a manner consistent with the rest of the constitution....” *Weiss v. Bruno*, 82 Wn.2d 199, 211, (1973), *overruled on other grounds*, *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445 (2002).

The District also argues that *Bartholomew* should not be followed because it was decided after *Gunwall*. Pet. Br. at 9. This ignores the fact that the *Gunwall* factors are “nonexclusive”. *Madison v. State*, 161 Wn.2d 85, 93 (2007). This Court must independently determine whether Washington’s due process clause provides greater protection in the truancy context guided by an analysis of the *Gunwall* factors and fundamental fairness. *Gunwall* teaches that the particular context in question should be examined. This Court in *Bartholomew* did find a broader due process protection in the state constitution. It can do so here.

The Court of Appeals rightly noted that children are particularly vulnerable and powerless in judicial proceedings. *Bellevue School Dist. v. E.S.*, 148 Wn. App. 205, 214-15 (2009). Truancy hearings are judicial proceedings instigated by the state against children, making an absence of counsel fundamentally unfair.

State constitutional analysis also is required because, under the sixth *Gunwall* factor, truancy proceedings concern local issues and national uniformity is not required. The District misapprehends this Court's analysis of local issues under this factor and attempts to argue that education is not a local issue, saying that "the simple fact that there exists some local control does [sic] mean that the issue is more local than national," and citing a Court of Appeals case about the tape-recording of custodial interrogations. Pet. Br. at 5-6 (citing *State v. Spurgeon*, 63 Wn. App. 503 (1991)). But it is clear that school districts have been created "for the management of matters of local concern...." *State v. Seattle Gas & Elec. Co.*, 28 Wn. 488, 505(1902) (quoting Dillon, Mun. Corp. (4th Ed.) § 9). Indeed, "education is perhaps the most important function of state and local governments." *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954). In light of the paramount duty of the state under Article 9, § 1 education is a local matter. No other State has so drastically emphasized common education. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 510-11 (1978). Truancy is specifically local, and as outlined in E.S.' Supplemental Respondent's Brief, 9-11, school districts act differently from each other.

Truancy proceedings may result in erroneous interference with the fundamental state constitutional right to education. Due process requires that this risk be weighed against the costs of providing counsel.

Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that it be interpreted differently. *Gunwall*, 106 Wn.2d 54, 61. Under both the fourth *Gunwall* factor (preexisting state law) and the fifth *Gunwall* factor (differences in structure between the constitutions),⁴ Article 9, § 1 provides additional and sufficient reason to engage in independent state constitutional analysis of due process requirements in truancy proceedings. The *Gunwall* Court described “the explicit affirmation of fundamental rights in our state constitution” as “a guaranty of those rights rather than as a restriction on them.” 106 Wn.2d, at 62.

Regarding pre-existing state law, Washington has been protective of the right to counsel. *See, e.g.*, RCW 71.34.720, regarding civil commitment proceedings: “In no event may the minor be denied the opportunity to consult an attorney.”; *In re Luscier*, 84 Wn.2d 135 (1974): the right to one's children is a “liberty” interest protected by the due process clauses of the federal and state constitutions, cited with approval in *In re Grove*, 127 Wn.2d 22, 236 (1995).

The District oversimplifies the Article 9 mandate as one “to fund education.” Pet. Br. at 6. Instead, “all children residing within the State’s

⁴ This Court consistently has concluded that the fifth factor supports an independent analysis. *In re King*, 162 Wn.2d 378, 393.

borders have a 'right' to be amply provided with an education.” *Seattle Sch. Dist. No. 1* at 513. The Washington legislature was “in compliance with this constitutional mandate” when it provided for compulsory school laws, the source of truancy proceedings. *See State ex rel. Shoreline Sch. Dist. No. 412 v. Sup. Ct.*, 55 Wn.2d 177, 181 (1960).

The District argues that this paramount state right to education is irrelevant and distorts the Court of Appeals opinion by saying that Article 9 does not support the conclusion that “a lawyer is constitutionally required to represent a juvenile who refuses to take advantage of the constitutional benefits that Art. 9, § 1 confers.” Pet Br. at 6. Yet the purposes of a truancy hearing are to determine if the child is in fact truant, absent without a lawful excuse, to ensure that the school has completed statutory prerequisites under RCW 28A.225.020(1) (aimed at resolving underlying problems) before filing suit, and to tailor an appropriate judicial remedy if necessary. These partly factual and partly legal determinations are significantly more likely to be erroneous in the absence of counsel representing the child. The District implies that a truancy hearing has no purpose, and fails to appreciate that due process is required to prevent *erroneous* deprivations of educational benefits.

The Court of Appeals recognized that “the statute permits the court to order the child to change schools or to enroll in an alternative education

program” and thus that truancy proceedings without counsel “pose a risk to the child’s right to education.” E.S., 148 Wn. App. at 216.

IV. CONCLUSION

The *Gunwall* factors are meant in part to ensure that a broadening of the state constitution “will be made for well founded legal reasons and not by merely substituting our notion of justice for that of ... the United States Supreme Court.” *Gunwall*, 106 Wn.2d at 62-63. The context of truancy proceedings provides ample well founded reasons for this Court to make its own determination of what justice and due process require. The local nature of education and of the truancy process makes this judgment appropriate. This Court should balance the possibility of erroneous deprivations of children’s paramount interest in education, in addition to their interests in privacy and physical liberty, against the minimal costs, if any, of providing counsel in truancy proceedings. Under Washington’s Constitution, due process requires provision of counsel.

Respectfully submitted,

Dated: December 31, 2009

Robert C. Boruchowitz WSBA # 4563

Taki Flevaris, Rule 9

Attorney for ES

Seattle University School of Law 1112 E. Columbia Street

Seattle, Washington 98122 (206) 398 4151

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Robert C. Boruchowitz
Director, The Defender Initiative
Professor from Practice
Seattle University School of Law
206 398 4151
Counsel for E.S. , Respondent